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No. 97-1043

In The

Supreme Court of the United States

October Term, 1997

VERNON G. JOHNSON,

Petitioner,

v.

BAYLOR UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Baylor University ("Baylor"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner, Vernon G. Johnson, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on September 18, 1997.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below.

Petitioner filed suit on June 20, 1996, alleging that Baylor discriminated against him on the basis of a perceived disability when Baylor decided to terminate Petitioner's employment as a pilot. Petitioner claimed discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12110 *et seq.*, and under the Rehabilitation Act, 29 U.S.C. §§ 700 *et seq.* At the close of discovery, on November 12, 1996, Baylor filed a Motion for Summary Judgment requesting that the Court grant summary judgment on both causes of action brought by Petitioner against Baylor. After the Motion was fully briefed by the parties, on February 12, 1997, the Court granted Baylor's Motion for Summary Judgment and entered a final judgment dismissing the case. (Petitioner's Appendix, hereinafter "Appendix" p. 1). Petitioner appealed to the U.S. Court of Appeals for the Fifth Circuit, and the U.S. Court of Appeals for the Fifth Circuit

affirmed the District Court's Judgment in an unpublished opinion entered on September 18, 1997. (Appendix p. 6).

Statement of Facts

Plaintiff commenced work as the Chief Pilot for Baylor on or about January 3, 1992. Plaintiff's employment with Baylor was terminated on August 26, 1994, after the then-President of Baylor, Dr. Herbert H. Reynolds, noted that "Johnson is a qualified pilot but his personal attributes diminish his professionalism and thus diminish the image of Baylor University. He does not represent the University in the way it must be represented." Dr. Reynolds had previously been critical of Plaintiff for his poor personal appearance, his use of incorrect grammar, his poor dress and grooming, and his failure to lose weight.

In affirming the District Court, the Fifth Circuit Court of Appeals followed well-established precedent from both within and outside the Fifth Circuit which establishes that the plaintiff in a perceived disability case must offer proof that the employer perceived the employee as being unable to work at a broad range of jobs in various classes within an accessible geographic region.

REASONS FOR DENYING THE WRIT

Petitioner appears to assert two reasons why this Court should grant a writ of certiorari in this case. First, Petitioner claims this is a significant case of public interest. Second, Petitioner claims there is a split in the Circuit

Courts of Appeals on the standard of proof for determining whether an employer has discriminated against an employee on the basis of a perceived disability. In fact, this case is not a significant case. Further, this case does not conflict with the other Court of Appeals' case cited by Petitioner. Neither this case separately nor when reviewed with the other Courts of Appeals' cases justifies the granting of the writ of certiorari requested by Petitioner. Petitioner's reasons are discussed in turn below. Following a discussion of the responses to Petitioner's arguments, Baylor will demonstrate that the Fifth Circuit's decision is correct. Lastly, Baylor will show that there is an additional defect in Petitioner's claims which would render review of the case pointless.

First Ground – This Case Is Not a Significant Decision

The Petitioner contends that this is a case of "grave significance." It is a case, like all cases, which is important to the parties; however, the Petitioner's own conduct and the Fifth Circuit Court's handling of this case clearly show that it is not a case of such importance.

Baylor filed its Motion for Summary Judgment on the last day permitted under the District Court's Scheduling Order for the filing of dispositive motions. Thus, Petitioner had the full allotment of time permitted by the District Court for discovery. Petitioner conducted no discovery in the case prior to the filing of the Motion for Summary Judgment. After the Motion was filed, Petitioner took the deposition of one employee of Baylor, Dr. Herbert H. Reynolds. Petitioner took no other depositions and never sent written discovery to Baylor.

In his Response to the Motion for Summary Judgment, Petitioner chose to rely only on his own Affidavit and selections from the only two depositions taken in the case, his deposition and the deposition of Dr. Reynolds. Petitioner did not submit any affidavits of third parties or attempt to take any additional depositions to develop evidence which might help him oppose the Motion for Summary Judgment. Petitioner's lack of effort in prosecuting the case and his half-hearted effort in resisting the Motion for Summary Judgment indicates that this case was not very important to him. This is not particularly surprising in light of the fact that Petitioner had found other employment as a pilot before the Motion for Summary Judgment was filed and shortly after exhausting his unemployment benefits. It should also be noted that Petitioner did not file a motion for rehearing or a motion for rehearing en banc with the Fifth Circuit.

This case is not important to the jurisprudence of the Fifth Circuit. The Fifth Circuit simply followed the holdings of several previous Fifth Circuit decisions dating back a number of years. *See, e.g., Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770, 136 L. Ed. 2d 715 (1997); *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996); *Dutcher v. Ingalls Shipbuilding, Inc.*, 53 F.3d 723 (5th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386, 128 L. Ed. 2d 61 (1994). In fact, the law recited by the Fifth Circuit in its opinion is so much common knowledge among employment law practitioners that the Court did not order its opinion to be published.

This case is simply one of the thousands of non-meritorious employment lawsuits which are filed by disgruntled employees every year and which are needlessly clogging our court system. The District Court properly granted summary judgment in Baylor's favor. Petitioner appealed and premised his appeal on a misconstruction of the District Court's opinion.[1] The Fifth Circuit saw through that argument and properly affirmed the District Court on the correct grounds. Petitioner refuses to give up his vendetta against Baylor and now comes to this Court with the arguments that the case is of grave importance and that there is a conflict among the Circuit Courts. Baylor has just demonstrated the lack of importance of this case. Baylor will now demonstrate that the purported conflict is contrived.

Second Ground – No Split in the Circuits

Petitioner contends that this Court should grant a writ of certiorari to review this case because of a claimed

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[1] In the Court of Appeals, Petitioner argued that the District Court had required him to prove that other employers would discriminate against him because of his obesity. This was not the holding of the District Court, and Petitioner mischaracterized the District Court's holding in an effort to create an issue for appeal. Petitioner continues this pattern of misframing the issue in his Petition for Writ of Certiorari. Petitioner tries to phrase the issue in terms of a physical *condition*. As will be discussed in more detail below, having a condition is not the test. An employee must have an *impairment* which amounts to a *substantial limitation* in a major life activity. Petitioner is attempting to misphrase the issue in order to lower the standard for asserting a claim and to confuse the issue before the Court.

split in the decisions of the Circuit Courts of Appeals. Petitioner makes this contention because the summary judgment for the employer in this case was affirmed while the First Circuit affirmed a judgment for an obese plaintiff bringing a perceived disability claim under the Rehabilitation Act. *See Cook v. State of Rhode Island, Department of Mental Health, Retardation, and Hospitals,* 10 F.3d 17 (1st Cir. 1993). There is no conflict between the Fifth Circuit's opinion in this case and the First Circuit's opinion in *Cook*. Petitioner states that the Fifth Circuit has unfairly required an employee to produce some evidence that the employer perceived the employee to be unable to perform a broad range of jobs for employers in the geographic area to which the employee has reasonable access by, for example, providing evidence that the employer thought that other employers would not hire the employee. Petitioner then goes on to assert that the Fifth Circuit's holding differs from the First Circuit's opinion in *Cook* by implying that the First Circuit would not require such evidence. Petitioner's assertion is unfounded. The *Cook* opinion is entirely consistent with the Fifth Circuit's opinion, and the *Cook* opinion actually supports Baylor's position. In *Cook*, the plaintiff established that the employer believed that the employee was precluded from working at a broad range of jobs for many employers:

> By his own admission, Dr. O'Brien believed plaintiff's limitations foreclosed a broad range of employment options in the health care industry, including positions such as community living aide, nursing home aide, hospital aide, and home health care aide. Detached jurors reasonably could have found that this pessimistic

> assessment of plaintiff's abilities demonstrated that appellant regarded Cook's condition as substantially limiting a major life activity – being able to work.

10 F.3d at 25. Thus, the *Cook* plaintiff met the test articulated by the Fifth Circuit in this case; she showed that her employer believed that other employers would not hire the plaintiff. Petitioner in the present case provided no proof of anything remotely equivalent to the evidence presented by the plaintiff in *Cook*. The *Cook* Court further noted that there was evidence to support liability because the plaintiff produced evidence that the employer perceived that she had physical limitations that would keep her from qualifying for a broad range of jobs. *Id.* at 26. Again, Petitioner produced no such evidence. Under the tests articulated by the First Circuit in *Cook*, Petitioner would have fared no better in the First Circuit than he did in the Fifth Circuit.

Petitioner is attempting to use the *Cook* case to confuse the issues in this case. Petitioner tries to use *Cook* to show that he has an impairment. The issue in this case and in the appeal and Motion for Summary Judgment below is not whether Petitioner's obesity amounted to an impairment but instead whether an alleged perceived impairment, if any, led to a perception that he had a substantial limitation in a major life activity such as preclusion from working at a broad range of jobs in various classes. Petitioner simply refuses to accept the fact that being "a representative of Baylor" is not a "broad range of jobs in various classes within an accessible geographic region."

The *Cook* case is quite consistent with Fifth Circuit case law on perceived disability claims. The *Cook* Court required the plaintiff to prove that the defendant believed that she was precluded from working in a broad range of jobs. "We think there is a significant legal distinction between rejection based on a job-specific perception that the applicant is unable to excel at a narrow trade and a rejection based on more generalized perception that the applicant is impaired in such a way as would bar her from a large class of jobs." *Id.* at 26. Thus, the First Circuit has, as has the Fifth Circuit, properly focused on the perception of the employer with respect to the employee's employment prospects.

The only real distinction between the *Cook* case and the present case is that different decisions were reached when different facts were applied to the same legal standard. This is not surprising – the plaintiff in *Cook* provided ample evidence that her employer perceived that she could not work in a broad range of jobs for other employers. Petitioner provided no such evidence, and, not surprisingly, the outcome was different.

In addition to being consistent with *Cook*, the Fifth Circuit's opinion in this case is also in conformity with the decisions of other Circuit Courts which have considered the issue. Like the Fifth Circuit, the other Circuit Courts have focused on what proof the plaintiff offered as to what the employer thought about the plaintiff's employability in other jobs and with other employers. For example, the Tenth Circuit has held that "an employer regards an employee as substantially limited in the ability to work when the employer regards the employee's

impairment or perceived impairment as foreclosing generally the type of employment involved." *Sutton v. United Air Lines, Inc.*, 130 F.3d 893, 904 (10th Cir. 1997). "It is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters." *Id.* at 905. The Third Circuit has relied on the supervisor's testimony that he did not regard the employee as being disabled in upholding a summary judgment for the employer in a perceived disability case. *Kelly v. Drexel University*, 94 F.3d 102, 109 (3rd Cir. 1996). Likewise, the Eleventh Circuit has focused on the perception of the employer in holding that "a significant impairment is one that is viewed by the employer as generally foreclosing the type of employment involved, not just a narrow range of job tasks." *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 913 (11th Cir. 1996). As the foregoing review of case law from a sampling of other circuits shows, there is no split in authority among the circuits as to the employee's burden to show that the employer perceived that the employee could not work at a broad range of jobs.

While it is clear that there is no split among the circuits with respect to the legal standard applicable to perceived disability cases and that this case does not merit the Supreme Court's attention, it is worth pondering for a few moments what Petitioner is asking this Court to do. Petitioner is asking this Court to convert appearance standards adopted by employers into legally recognized perceived disabilities. Under Petitioner's circular reasoning, any appearance standard which an employee cannot meet therefore prevents the employee from working at that job or similar jobs with the

employer, and the employee thus has a perceived disability for which he can now sue. A few examples will suffice to show how Petitioner's theory would turn the ADA on its head and open the floodgates for all kinds of petty lawsuits. Example one: an Italian fashion design house desires to hire slender models to model its clothing at an American fashion show. Under Petitioner's theory, the design house could not take weight or appearance into consideration in hiring the models, regardless of whether they could even fit into the clothes. Example two: a police department imposes weight standards because leaner police officers are more likely to be in better physical condition and more able to pursue fleeing suspects. Under Petitioner's theory, the police department could not take such considerations into account, regardless of whether they possibly affected public safety. Example three: a designer of clothing for overweight individuals desires to hire appropriately built individuals to model the clothing. Under Petitioner's theory, the designer will have to hire thin models if they apply and even if their employment harms the employer's business.

Petitioner would undoubtedly assert that the above examples are extreme and that, further, he is only trying to protect the "morbidly obese." Nevertheless, once the Court started down the road proposed by Petitioner, such lawsuits would become commonplace because there would be no reason to distinguish between an appearance standard based on weight and other appearance standards. Further, if only the morbidly obese are protected, then even more ridiculous results would occur. Under such a rationale, the fashion design house can reject the model who is ten pounds overweight but must

hire the one who is 100 pounds overweight, and the fire department can reject the firefighter who is twenty pounds overweight but would have to hire one who is even more than 100 pounds overweight.

In the few short years that the ADA has been in existence, attorneys for employees have already proposed legal theories which far exceed the intended scope of the ADA. The theory postulated by Petitioner far exceeds the intent of the ADA and, if adopted, would make it impossible for employers to impose appearance standards on employees.

As demonstrated above, there is no split among the Circuit Courts with respect to the applicable legal standard. Petitioner has attempted to manufacture a split in order to present this Court with a legal theory which would greatly expand litigation under the ADA. This Court should not countenance Petitioner's attempt to misconstrue the ADA.

Third Ground – This Case Was Correctly Decided

In his First Amended Original Complaint, which was his live pleading at the time summary judgment was granted, Petitioner asserted two causes of action for discrimination due to an alleged perceived disability. Specifically, in Paragraphs 18-21 of his First Amended Original Complaint, Petitioner alleged as follows:

> 18. Baylor, acting by and through its agent, then-President Herbert H. Reynolds, perceived Johnson's obesity to be a disability substantially limiting Johnson's ability to perform a broad

range of jobs that involved identification with and/or representation of Baylor.

19. At all times during his employment, Johnson was qualified for employment as Chief Pilot of Baylor, having the requisite skill, experience, education, and other job-related requirements of the employment position and Johnson was able to perform the "essential functions" of the position without reasonable accommodation.

20. Johnson's employment with Baylor was terminated as a direct and proximate result of Johnson's obesity; and Baylor's action in terminating Johnson's employment constituted intentional discrimination against him on the basis of his physical condition, i.e. obesity, which was perceived to be a disability that precluded Johnson from being employed as a representative of Baylor.

21. Baylor's actions in terminating the employment of Johnson violates 42 U.S.C. § 12112, *et seq.*, and 29 U.S.C. § 794, which prohibit discrimination on the basis of disability.

Petitioner's perceived disability claims were brought under the Americans with Disabilities Act, 42 U.S.C. §§ 12110, *et seq.*, and the Rehabilitation Act, 29 U.S.C. § 700, *et seq*. The standard for a perceived disability claim under the two statutes is identical.

As will be discussed in greater detail below, in order to maintain a perceived disability claim, a plaintiff must prove that the employer perceived him as being unable to work at a broad range of jobs in various classes within an

accessible geographic region. Before turning to the relevant authority on perceived disability claims, it may be helpful to review the underlying statutory basis for such a claim. The ADA prevents employers from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). The ADA defines "disability" as follows:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Petitioner attempted to plead his case so as to fall under subsection (C). "Read in conjunction with subsection (A), subsection (C) prescribes that a person is considered disabled for purposes of the ADA if that person is regarded as having an impairment that 'substantially limits' a 'major life activit[y].' " *Wooten v. Farmland Foods*, 58 F.3d 382 (8th Cir. 1995). The limiting adjectives "substantially" and "major" indicate that the perceived "impairment must be a significant one." *Byrne v. Board of Education, School of West Allis*, 979 F.2d 560, 564 (7th Cir. 1992). "A person is 'regarded as having' an impairment that substantially limits the person's major life activities when other people treat that person as having a substantially limiting impairment." *Wooten*, 58 F.3d at 385.

The Equal Employment Opportunity Commission regulations provide in relevant parts:

29 C.F.R. § 1630.2:

(h) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits:

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under

which the average person in the general population can perform that same activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment;

(iii) The permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working:

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining

whether an individual is substantially limited in the major life activity of "working":

> (A) The geographical area to which the individual has access;
>
> (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skill or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
>
> (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Petitioner attempted to plead that Baylor perceived him to be unable to perform the major life activity of "working" at Baylor. Petitioner did not, and could not, plead or prove the necessary allegation that Baylor perceived him as being unable to work at a broad range of jobs in various classes within an accessible geographic

region. In fact, Petitioner's Original Complaint and First Amended Original Complaint conclusively established that Baylor perceived that he could work at other jobs for other employers, including other pilot jobs. As noted in the Original Complaint and First Amended Original Complaint, Dr. Reynolds commended Petitioner on his piloting skills and found that he met the standards concerning the knowledge of his job and the quantity of his work. Petitioner also held a medical certificate which permitted him to work as a commercial pilot. In any event, the Affidavit of Dr. Reynolds submitted with Baylor's Motion for Summary Judgment established that Dr. Reynolds did not perceive that Petitioner could not work for other employers in either this class of jobs or a broad range of jobs in various classes. Accordingly, summary judgment for Baylor was appropriate.

The Fifth Circuit and other Circuits have analyzed the statutes and regulations and have held that a plaintiff in a perceived disability case must prove that the employer perceived that the disability prevented the plaintiff from holding a broad class of jobs. In *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995), the Fifth Circuit upheld a summary judgment for the employer in a perceived disability case because the plaintiff did not present evidence that her disability prevented her from "performing an entire class of jobs." *Id.* at 727. The inability to perform one aspect of a job while retaining the ability to perform the work in general does not amount to a substantial limitation of the activity of working. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993),

cert. denied, 128 L. Ed. 2d 61 (1994).[2] " 'Working' does not mean working at a particular job of that person's choice." *Wooten*, 58 F.3d at 386. "An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." *Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1095, 130 L. Ed. 2d 1063 (1995).

The Fifth Circuit also considered a perceived disability claim in *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996).

> As noted, an employer does not necessarily regard an employee as having a substantially limiting impairment simply because it believes she is incapable of performing a particular job; "[t]he statutory reference to a substantial limitation indicates instead that an employer regards an employee as [substantially limited] in his or her ability to work by finding the employee's impairment to foreclose generally the type of

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[2] Although *Chandler* is a Rehabilitation Act case, the definition of "disability" in the ADA is virtually the same as in the Rehabilitation Act, making cases decided under the Rehabilitation Act instructive. "[T]he substantial equivalency of the definition of disability under the Rehabilitation Act and the ADA strongly suggest that prior constructions of the Rehabilitation Act should be generally applicable in construing the ADA definitions of 'disability.' " *Dutcher*, 53 F.3d at 727 n. 14. "The legislative history of the ADA indicates that 'Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term "disability" as used in the ADA.' " *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 943 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 1104, 130 L. Ed. 2d 1071 (1995) (quoting 29 C.F.R. § 1630, App., § 1630.2(g)).

> employment involved." *Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986); *see also* 29 C.F.R. § 1630.2(j)(3)(i).

Id. at 192; *see also Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996) (inability to perform one aspect of a job does not constitute a substantial limitation in the major life activity of working). Petitioner did not plead that Baylor perceived that he could not generally work as a pilot for some other employer. It is clear from the Complaint and from Dr. Reynold's Affidavit that Baylor did not perceive that Petitioner could not be a pilot. The performance reviews clearly praised Petitioner for his ability to be a pilot. Instead, Petitioner's complaint, like that in *Dutcher*, was that Baylor perceived Petitioner as being unable to perform only one aspect of the pilot's job at Baylor – that of being a representative of Baylor. The inability to perform this aspect of the pilot's job is not sufficient to support an allegation of perceived disability because Baylor clearly perceived Petitioner as able to be a pilot. As a result, there was no perceived restriction on Plaintiff's ability to be a pilot.

The Second Circuit's decision in *Daley v. Koch*, 892 F.2d 212 (2d Cir. 1989), shows how far Petitioner's claim fell short of the mark. In *Daley*, the New York City Police Department refused to hire the plaintiff because he scored poorly on a psychological evaluation. The plaintiff alleged that the Police Department perceived his personality traits to be a disability and that this disability substantially limited him in a major life activity – working in the Police Department. The District Court granted summary judgment, which was affirmed. The Court of Appeals held:

> However, the regulations cannot be interpreted to extend this definition to include working at the specific job of one's choice. The position of New York City police officer demands unique qualifications that appellant has failed to meet. Being declared unsuitable for the particular position of police officer is not a substantial limitation of a major life activity.

892 F.2d at 212 (internal citations omitted). The City of New York employs over 27,000 police officers. *Chandler*, 2 F.3d at 1392 n. 29. If it is lawful for New York City to exclude a potential employee from 27,000 positions due to the failure to meet a standard, then it is certainly lawful for Baylor to exclude Petitioner from a much smaller number of positions due to his failure to meet Baylor's standards.

Rather than address the cases which mandate that summary judgment be granted for Baylor, Petitioner has tried to cherry pick from the definitions contained in an appendix to the Code of Federal Regulations to try to find an example which he contends is similar to his situation. Petitioner now contends that his appearance was "somewhat like a cosmetic disfigurement." Petitioner tries to analogize his case to that of a salesperson with a prominent facial scar. In making this argument, Petitioner attempts to blur the distinction between an "impairment" and a "disability." A facial scar may be an "impairment," but it does not rise to the level of a "disability" unless the employer regards the impairment as substantially limiting the employee's ability to work in a broad range of jobs. In the facial scar example cited in the Appendix, it is assumed that the employer believes that the employee cannot work as a salesperson, which could be a broad

range of jobs. In the present case, the summary judgment proof established that Baylor only believed that Petitioner was excluded from a narrow range of jobs at Baylor. In fact, the evidence further showed that Baylor believed that Petitioner was fully capable of performing other pilot jobs. As Petitioner offered no summary judgment evidence that Baylor believed he could not perform a broad range of jobs, the District Court properly granted summary judgment for Baylor.

In *Ray v. Glidden Co.*, 85 F.3d 227 (5th Cir. 1996), the Court held that Ray's inability to perform continuous lifting did not amount to a disability. Likewise, in the present case, Petitioner has presented no evidence that Baylor perceived that he could not perform any of the major life activities of caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working. Without such proof, there is no evidence of a perceived disability.

In *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 770, 136 L. Ed. 2d 715 (1997), the plaintiff's mild hemophilia caused the City to refuse to hire him as a firefighter which also precluded him from being hired as a municipal paramedic or EMT. The Court found that this limitation only affected a narrow range of jobs. *Id.* at 334. The Court further held that the plaintiff had not shown that he was prevented from working in a class of jobs, as being a firefighter was too narrow to be a class of jobs. *Id.* at 335-36. This holding shows that Petitioner's evidence did not even approach creating a genuine issue of material fact. If the position of being a firefighter, paramedic, or EMT does not amount to a broad range or class of jobs, then being a pilot (or even an

"executive") for Baylor certainly does not amount to a broad range or class of jobs.

An example from another circuit also demonstrates that Petitioner's evidence was insufficient to create a genuine issue of material fact. In *Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997), two commuter airline pilots were denied positions with a major air carrier because, although their corrected vision was 20/20, their uncorrected vision exceeded United's standard for uncorrected vision of 20/100 or better. Plaintiffs alleged that United regarded them as being disqualified from an entire class of employment, that of being a global airline pilot. The District Court dismissed the case, and the Court of Appeals affirmed the dismissal. The Court held that "global airline pilot" was too narrow of a description to constitute a class of jobs. *Id.* at 905. The Court noted that: "Adopting Plaintiffs' reasoning would imply that anyone who failed to obtain a single job because of a single requirement of employment would become a 'disabled' individual because the employer would thus be regarding the applicant's failure as substantially limiting in the major life activity of working." *Id.* Such a construction of the ADA would serve as a handout to those who are in fact capable of working in substantially similar jobs. *Id.* at 906.

The above discussion of applicable case law indicates that Petitioner did not come close to meeting his summary judgment burden of providing evidence that Baylor perceived that he was substantially limited in performing either a class of jobs or a broad range of jobs in various classes. Accordingly, the Fifth Circuit properly affirmed the summary judgment for Baylor.

Fourth Ground – The Case Contains Other Defects

Lastly, Baylor would note that there is another ground on which summary judgment and affirmance would have been proper, thereby making it pointless for the Court to address the issues raised by Petitioner. Petitioner failed to plead or prove another essential aspect of his cause of action, i.e., whether the employer perceived that the obesity was related to a physiological disorder. Relying on the EEOC's regulations, two Courts of Appeals have recently addressed obesity cases and held that there must be proof that the employer perceived that the obesity was caused by a physiological disorder. The EEOC's interpretive regulations to the ADA explain that "the term 'impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, *weight* or muscle tone that are within 'normal' range *and are not the result of a physiological disorder.*" 29 C.F.R. § 1630.2(h) (emphasis added). While Petitioner may argue that his weight was outside normal range, he has no evidence to show that Baylor perceived that his weight was the result of a physiological disorder.

In *Francis v. City of Meriden*, 129 F.3d 281 (2nd Cir. 1997), an overweight firefighter sued under the ADA after he was disciplined for failing to meet the City's weight standards. The District Court dismissed the case and the Second Circuit affirmed because there was no allegation that the obesity related to a physiological disorder. The Court noted that, to hold otherwise, would open up the "regarded as" prongs of the ADA and the Rehabilitation Act to a range of physical conditions not meant to be covered by these acts. *Id.* at 286. "This would make the central purpose of the statutes, to protect the

disabled, incidental to the operation of the 'regarded as' prong, which would become a catch-all cause of action for discrimination based on appearance, size, and any number of things far removed from the reasons the statutes were passed." *Id.* at 287. The Sixth Circuit has also held that there must be proof that the employer believed that the employee's obesity was caused by a physiological disorder in order to make out a perceived disability claim. *Andrews v. State of Ohio*, 104 F.3d 803 (6th Cir. 1997).

As Petitioner has failed to allege or submit evidence that Baylor perceived that his obesity was due to a physiological disorder, it would be pointless for this Court to devote its resources to a case which is doomed to dismissal on an alternate ground.

CONCLUSION

Petitioner has failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. There is no split among the circuits. Rather, in this case and the other case cited by Petitioner, the Courts of Appeals applied the same rule of law to the different facts presented in each case. Each court then reached a proper decision based on those facts. Further, this case has not been used by the District Court or the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties.

Petitioner contends the Fifth Circuit Court of Appeals reached an incorrect result; however, this appears to be an argument that the Fifth Circuit Court of

Appeals improperly applied the law established by the statute and regulations to the facts in this case. Such an evidentiary review is not favored by this Court. Further, Respondent strongly believes that the District Court and the Fifth Circuit Court of Appeals were correct in their decisions. This case does not merit further review by this Court.

For all of the foregoing reasons, Respondent requests that Petitioner's petition be denied.

Respectfully submitted,

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